(20)

Office - Supreme Court, U. S.
FILED
OCT 12 1943
CHARLES ELMORE CROPLEY
CLERK

No. 350

In the Supreme Court of the United States

October Term, 1943.

PUBLIC SERVICE COMPANY OF OKLAHOMA, A CORPORATION, *Plaintiff*,

vs.

JOE T. PARKINSON, COUNTY TREASURER OF TULSA COUNTY, OKLAHOMA, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*.

CLAUDE H. ROSENSTEIN,
DIXIE GILMER,
County Attorney of
Tulsa County, Oklahoma,
WILLIAM M. TAYLOR,
Assistant County Attorney
of Tulsa County, Oklahoma,
Counsel for Respondent.

INDEX.

	PAGE
Opinion of the court	1
Statement of grounds upon which jurisdiction is invoked	1
Summary	2
Argument	7

CASES CITED.

Honeyman v. Hanan, 300 U. S. 14-26, 81 L. ed. 476	10
Protest of National Bank of Guthrie, 136 Okl. 141, 276 Pac. 766	5
Southwestern Bell Telephone Co. v. State of Oklahoma, 303 U. S. 206-213, 82 L. ed. 751	8
Texas Empire Pipe Line Co. v. Tulsa County Excise Board, 187 Okl. 591, 104 P. (2d) 441	6

STATUTES.

Initiatory Petition 100, Secs. 1 and 2	3-4
Oklahoma Session Laws 1915, Sec. 7, Sub. B, Art. 1, Ch. 107	2
Oklahoma Compiled Statutes 1921, Sec. 9971	2
Oklahoma Statutes 1931, Sec. 12665	2
Oklahoma Statutes 1941, Secs. 331-332	3-4

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1943.

No. 350

PUBLIC SERVICE COMPANY OF OKLAHOMA, A CORPORATION, *Plaintiff,*

vs.

JOE T. PARKINSON, COUNTY TREASURER OF TULSA COUNTY, OKLAHOMA, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

Opinion of the Court.

The opinion of the court below has not been officially or otherwise reported. A copy of the opinion appears in the printed transcript of the record, pages 81-86. Petitioner erroneously states that it is reported in 131 P. (2d) 745.

Statement of Grounds Upon Which Jurisdiction Is Invoked.

Jurisdiction of this court is invoked by virtue of Section 344 (b), Title 28 of the United States Code, 28 U. S. C. A. 344(b), 43 Stat. L. 937 (petitioner's petition, p. 13). Specifically the jurisdiction of this court is invoked upon the ground that in the final judgment of the Supreme Court of Oklahoma in this case (the highest court of that state in which a decision could be had) there was drawn in question the validity of a statute of the State of Oklahoma on the

ground of its being repugnant to the Constitution of the United States.

Summary.

(Emphasis throughout supplied.)

This suit was originally filed by petitioner, as plaintiff, in the District Court of Tulsa County, Oklahoma, on December 9, 1938 (Rec., p. 2). The petitioner by the institution of this suit sought to recover from respondent, as defendant in the original action, certain taxes levied against plaintiff's property, located in four disorganized school districts which had been annexed to Independent School District No. 22 of Tulsa County, Oklahoma (Rec., pp. 2-5). The action was based upon a statute of the State of Oklahoma permitting taxpayers to pay taxes under protest and within thirty days thereafter institute suit against the County Treasurer for their recovery. The Oklahoma Statute authorizing the institution of suits of this nature is Section 7, Subdivision B, Art. 1, Ch. 107, Session Laws of Oklahoma 1915[1]. (Sec. 12665, Oklahoma Statutes 1931; Sec. 9971, Compiled Oklahoma Statutes 1921.)

---

[1]Section 7, Subdivision B, reads:

"SECTION 7. In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, *the court shall render judgment showing the correct and legal amount of taxes due by such person*, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer *shall pay to such person the excess* and shall take his receipt therefor."

Subsequent to the enactment by the Oklahoma Legislature of the above mentioned statutes the voters of Oklahoma, pursuant to constitutional authority authorizing the electors of the state to initiate, and by popular vote adopt legislation, enacted a bill known as Initiative Petition No. 100. (Title 68, Secs. 331-341, O. S. 1941) Initiative Petition No. 100 was adopted August 7, 1928, prior to the institution of the instant action by petitioner in the District Court of Tulsa County, Oklahoma. Initiative Petition No. 100 provides that after the proper authorities have fixed the tax levies (each year) for all municipal subdivisions of the state, as provided by law, a copy of all budgets with the levies made thereon shall be filed with the state auditor of the State of Oklahoma and a like copy with the county clerk of the respective counties. Taxpayers of the state are given, at all times, the right to examine the budgets and levies on file with the respective county clerks and with the state auditor "for the purpose of checking same for illegalities in the levies made" and any taxpayer may within forty days from the date of the filing of such budgets with the state auditor protest the alleged illegality of any levy. If no protest is filed by any taxpayer as to the levies of any county or municipal subdivision thereof within said forty-day period "all appropriations and levies of said counties and municipal subdivisions thereof not protested, shall be deemed to be legal, and all proceedings for refunds or suits for refunds or recovery of taxes or to contest the validity thereof in any manner shall be barred." (Init. Pet. 100, Secs. 1 and 2; Title 68, O. S. 1941, Secs. 331-332.)[2]

[2]Title 68, Section 331, Oklahoma Statutes 1941:

"331. *Municipal Budgets and Levies—Filing—Notice.* After the officers of the several municipal subdivisions of the state, constituting the budget making bodies of such subdivisions, including counties, cities, towns, school districts and townships, shall have made and filed their budgets as required by existing laws with the county clerks, and after advertisement as now required by law, the excise boards shall meet on the last Saturday in July and from time to time thereafter until the State Board of Equalization shall

Initiative Petition No. 100 creates a special court known as a "Court of Tax Review," which court is given the power and the duty to hear and determine all protests filed under the act. Provision is made for appeals from the Court of Tax Review to the Supreme Court of Oklahoma.

The Supreme Court of Oklahoma after the adoption of

---

have reported the valuation of Public Service Corporations and utilities, together with the equalized valuation of all other property, to the county, and shall then proceed to pass on appropriations and make levies for all such municipal subdivisions as now provided by law, and shall file a copy of all budgets with the levies made thereon, with the State Auditor, and one copy with the county clerks of the respective counties, and the county clerk shall immediately thereafter publish notice for one time, in some newspaper of general circulation in the county, that such budgets and levies are on file for the inspection of any citizen.

"Within three days after the filing of any such budgets and levies with the State Auditor he shall give notice by mail of the fact and date of such filing with him to any taxpayer who shall have filed written request therefor. State Question No. 152, Initiative Petition No. 100, Sec. 1, adopted Aug. 7, 1928."

Title 68, Section 332, Oklahoma Statutes 1941:

"332. *Examination of Budgets and Levies by Taxpayers—Filing Protests—Disposition of Copies—Effect of Absence of Protest—Reduction of Illegal Budgets and Levies by Excise Board.* Taxpayers of the state shall have the right at all times, to examine the budgets and levies on file with the respective county clerks of the state and with the State Auditor, for the purpose of checking same for illegalities in the levies made, and any taxpayer may, at any time within forty days from the date of filing with the State Auditor as above provided for, file a protest in writing together with three copies thereof, with the State Auditor against any alleged illegality of any levy and the State Auditor shall thereupon transmit by registered mail one copy of each to the county clerk, the county attorney and county treasurer of the county affected thereby, or said protest with the same number of copies may be filed with the county clerk in which event the county clerk shall transmit one copy of each to the State Auditor and to the county attorney and county treasurer of the county affected thereby and such filing shall have the same force and effect as though filed with the State Auditor. The said protest shall specify the said alleged illegal levy and the grounds upon which said alleged illegalities are based. Any protest filed by any taxpayer as herein provided shall inure to the benefit of all taxpayers. If no protest is filed by any taxpayer as to the levy of any county or municipal subdivision thereof within said forty-day period all appropriations and levies of said county and municipal subdivisions thereof not protested, shall be deemed to be legal, and all proceedings for refunds or suits for refunds or recovery of taxes or to contest the validity thereof in any manner shall be barred.

"The Excise Board may reconvene at any time within sixty days after the filing of the budgets and levies with the State Auditor and reduce any protested budgets and levies which the Excise Board deems to be illegal. State Question No. 152; Initiative Petition No. 100, Sec. 2, adopted Aug. 7, 1928."

Initiative Petition No. 100 held that the 1915 statute providing for the payment of taxes under protest and for the institution within thirty days thereafter of suit for the recovery of taxes so paid under protest was, by Initiative Petition No. 100, *repealed in so far as questions involving the legality of ad valorem tax levies is concerned* and that said statute remains in effect only in so far as questions may arise which involve *the application of a legal ad valorem tax levy* in an unlawful manner or to specific property. *Protest of First National Bank of Guthrie,* 136 Okl. 141, 276 Pac. 766.

The gist of the decision by the Supreme Court of Oklahoma in this case is concisely set forth in three paragraphs taken from its opinion. These read as follows:

> "There is nothing in Initiative Petition No. 100 that gives the Court of Tax Review authority to determine whether or not specific property is subject to ad valorem taxation.
>
> * * * * * * * *
>
> "The jurisdiction of the Court of Tax Review is limited to a determination of whether or not the ad valorem tax levy is legal, and that court has no jurisdiction to review the application of a legal ad valorem tax levy in an unlawful manner or to specific property.
>
> "The act repeals all acts and parts of acts in conflict therewith. Under this provision *Section 9971, C. O. S. 1921, is repealed in so far as it affects questions which involve the legality of the tax rate determined and fixed by the county excise board. But in so far as that section affects questions which involve the application of a legal ad valorem tax levy in an unlawful manner or to specific property, the same remains in force and effect.*"

Section 9971 C. O. S. 1921, referred to in the above opinion, is the same statute as Section 7, Subdivision B, Art. 1, Ch. 107, Session Laws of Oklahoma 1915.

Therefore, it is the contention of respondent that the only question in controversy in this suit was whether or not a tax levy (which for the purpose of this suit must be treated as a legal tax levy) was properly applied against the property of petitioner. All of the argument of petitioner with reference to the tax levy being void or as to its illegality pertains to matters which were not in controversy in this case. The Supreme Court of Oklahoma, in its opinion in this case, refused to pass upon those questions. This identical tax levy had been attacked in the Court of Tax Review, the Court of Tax Review had dismissed the protest and the Supreme Court of Oklahoma in another decision had affirmed the action of the Court of Tax Review. (Petitioners brief, Appendix A, pp. 43-46) For this reason the Supreme Court of Oklahoma, in its opinion in this case, disposed of the question of the legality of the rate of levy in one line. It said "The legality of the rate of levy has been established. *Texas Empire Pipe Line Company* v. *Tulsa County Excise Board,* 187 Okl. 591, 104 P. (2d) 441." (Rec., p. 82)

Because of the above facts it is the contention of respondent that no federal question was properly presented to the Supreme Court of Oklahoma in this case and the decision of the Supreme Court of Oklahoma was based solely and entirely upon non-federal grounds.

ARGUMENT.

A careful examination of the decision of the Supreme Court of Oklahoma, as reflected by its opinion in this case, discloses that this case was decided solely and entirely on non-federal grounds. The opinion (Rec., pp. 81-86) holds that if in the assessment of petitioner's property any act of omission or commission occurred, which was in violation of a direct and mandatory statutory provision which had the effect of depriving petitioner of a fundamental and substantial right, then the court's decision should be in favor of petitioner without regard to whether its property might or might not completely escape the payment of a legal tax levy. Otherwise, no such result should obtain (Rec., p. 84). The Supreme Court of Oklahoma then reviewed the facts and concluded that the assessment as shown by the completed tax rolls was not in conflict with or contrary to the conclusion of the State Board of Equalization (the statutory assessor of petitioner's property) and that, therefore, petitioner had not shown a void assessment and petitioner having failed to plead *or prove any injury,* fraud or collusion, it was not entitled to recover the taxes which it had paid under protest (Rec., pp. 84-86).

In reaching the above conclusion, the Supreme Court of Oklahoma did not determine that any statute of the State of Oklahoma was valid or invalid as being repugnant to or in accord with the Constitution of the United States. The Supreme Court of Oklahoma, by its decision in this case merely held that petitioner's property was assessed by the body authorized by the Oklahoma Statutes to assess petitioner's property; that in reporting that assessment to the local taxing authorities in Tulsa County, Oklahoma, there were certain omissions or irregular entries which did not

prejudice the rights of the taxpayer and that in such a case the taxpayer would not be heard to complain "in this kind of suit *where no actual definite injury is claimed or shown.*" (Rec., p. 85)

This court will not review a decision of the highest court of a state unless the record affirmatively discloses that a federal question was presented to the state court which was necessarily passed upon by that court and actually decided by it, or that its judgment as rendered could not have been given without deciding it.

The rule is concisely stated in *Southwestern Bell Telephone Company* v. *State of Oklahoma,* 303 U. S. 206-213, 82 L. ed. 751, in the following language:

> "We have repeatedly held that it is essential to the jurisdiction of this court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that *its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure* v. *Gaillard,* 127 U. S. 216, 234, 32 L. ed. 125, 132, 8 S. Ct. 1053; *Johnson* v. *Risk,* 137 U. S. 300, 306, 307, 34 L. ed. 683, 686, 11 S. Ct. 111; *Walter A. Wood Mowing & Reaping Mach. Co.* v. *Skinner,* 139 U. S. 293, 295, 297, 35 L. ed. 193-195, 11 S. Ct. 528; *Whitney* v. *California,* 274 U. S. 357, 360, 361, 71 L. ed. 1095, 1099, 1100, 47 S. Ct. 641; *Lynch* v. *New York,* 293 U. S. 52, 54, 79 L. ed. 191, 192, 55 S. Ct. 16."

In an effort to cause it to appear affirmatively from the record in this case that a federal question was presented for decision to the Supreme Court of Oklahoma; that its decision of this federal question was necessary to the determination of the cause and that such federal question was actu-

ally decided, petitioner procured from the Supreme Court of Oklahoma a "certificate" signed by the chief justice of the Supreme Court of Oklahoma under date of the 29th day of July, 1943 (Rec., pp. 90-93).

This certificate, we submit, *does not disclose that the Supreme Court of Oklahoma based its decision in this case upon a federal ground.* The certificate recites that the petitioner in its first amended and supplemental petition filed in the District Court of Tulsa County, Oklahoma, complained that the taxes sought to be recovered had been taken from it by processes constituting deprivation of its property without due process of law and constituting a denial to it of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States; that this complaint was denied by the trial court and the question preserved for presentation to the Supreme Court by assigning that the trial court's judgment was erroneous because "contrary to law;" that in its "Brief of Plaintiff in Error" petitioner presented argument and authorities to sustain its contentions as to said alleged error and that consideration and determination of the questions "so raised was necessary" to the decision of the Supreme Court of Oklahoma *as shown by the opinion of the Supreme Court of Oklahoma* filed on February 2, 1943.

That petitioner in its "Petition for Rehearing and Brief in Support Thereof" again alleged errors raising constitutional questions and argued them in its petition for rehearing and that *by denying said petition for rehearing* the Supreme Court of Oklahoma decided said questions "adversely to the contentions" of the petitioner.

This certificate, when properly analyzed, says nothing except that these constitutional questions were included in protestant's first amended and supplemental petition and were decided against protestant *as shown by the opinion of*

the Supreme Court of Oklahoma and were again decided against petitioner by the denial by the Supreme Court of Oklahoma of petitioner's "Petition for Rehearing." There is nothing in this certificate which discloses that the decision of these federal questions was necessary to the determination of the cause by the Supreme Court of Oklahoma; that they were actually decided by that court, or that the judgment as rendered could not have been given without deciding them.

The determination of whether a federal question was necessarily passed upon by the state court, or whether its decision of that question was necessary to the determination of the cause must rest upon an examination of the record. A certificate or statement of the state court is not controlling; that question is itself a federal question, which must be determined by this court. *Honeyman* v. *Hanan,* 300 U. S. 14-26, 81 L. ed. 476, the pertinent portion of the opinion reads:

> "Before we may undertake to review a decision of the court of a state *it must appear affirmatively from the record,* not only that the federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. *Lynch* v. *New York,* 293 U. S. 52, 54, 79 L. ed. 191, 192, 55 S. Ct. 16, and cases there cited. *Whether these requirements have been met is itself a federal question.* As this court must decide whether it has jurisdiction in a particular case, this court must determine whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record. *A certificate or statement by the state court that a federal question has been presented to it and necessarily passed upon is not controlling. While such a certificate or statement may aid this court in the examination of the record, it cannot avail to foreclose the inquiry which it*

is our duty to make or to import into the record a federal question which otherwise the record wholly fails to present.''

For the reasons above stated, we respectfully submit that it does not affirmatively appear from the record in this case that a decision of a federal question was necessary to the determination of this cause; that such federal question was actually decided or that the judgment as rendered by the Supreme Court of Oklahoma could not have been given without deciding it.

For these reasons the petition for writ of *certiorari* should be denied.

Respectfully submitted,

CLAUDE H. ROSENSTEIN,
DIXIE GILMER,
County Attorney of
Tulsa County, Oklahoma,
WILLIAM M. TAYLOR,
Assistant County Attorney
of Tulsa County, Oklahoma,
All of Tulsa, Oklahoma,
Counsel for Respondent.